TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 383

HOWARD R. MARSHALL, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5796

HOWARD R. MARSHALL, Appellant,

vs.

THE UNITED STATES OF AMERICA, Appellee.

APPELLANT'S STATEMENT OF POINTS—Filed January 10, 1958

The Appellant will rely on the following Points:

1. The District Court was without jurisdiction of the offenses involved herein, and if it is deemed to have by reason of construction of the statutes involved, then to that extent, said statutes would be unconstitutional.

2. The Court erred in not directing a judgment of acquittal when the evidence proved entrapment and the Government did not offer, nor have to offer, rebuttal evidence.

3. The Appellant was deprived of a fair trial by reason of the fact that the Jury during the course of the trial read newspaper accounts relative to the Appellant's alleged background in crime and previous convictions.

4. The verdicts were not supported by substantial evidence.

George J. Francise, Attorney for Appellant.

Filed January 10, 1958.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 15,043, Criminal

UNITED STATES OF AMERICA, Plaintiff,

vs.

HOWARD R. MARSHALL, Defendant.

INFORMATION

21 U.S.C. 331 and 333, Misbranding thru indiscriminate dispensing of drugs without prescription.

Count I

The United States Attorney charges:

That prior to April 23, 1956, a number of dextroamphetamine sulfate tablets, a drug within the meaning of 21 U.S.C. 353(b)(1)(B), were shipped in interstate commerce into the State of Colorado;

That thereafter, on or about April 23, 1956, and while a number of tablets of said drug were being held for sale after shipment in interstate commerce, as aforesaid, in the City and County of Denver, State of Colorado, Howard R. Marshall, the defendant herein, did, at the City and County of Denver, State of Colorado, within the District of Colo-
[fol. 3] rado, cause a number of tablets of said drug to be dispensed in a tissue paper type package to one Robert E. Keating, without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drug, as aforesaid, was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said tissue paper type package being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

Count II (Withdrawn)

* * * * * * *

Count III

The United States Attorney further charges:

That prior to May 1, 1956, a number of dextroamphetamine sulfate tablets, a drug within the meaning of 21 U.S.C. 353(b)(1)(B), were shipped in interstate commerce into the State of Colorado;

That thereafter, on or about May 1, 1956, and while a number of tablets of said drug were being held for sale after shipment in interstate commerce, as aforesaid, in the City and County of Denver, State of Colorado, Howard R. Marshall, the defendant herein, did, at the City and County of Denver, State of Colorado, within the District of Colorado, cause a number of tablets of said drug to be dispensed in a vial to one Robert E. Keating, without a prescription therefor from a practitioner licensed by law to administer said drug;

That said act of causing the dispensing of said drug, as aforesaid, was an act caused to be done by said defendant, contrary to the provisions of 21 U.S.C. 353(b)(1), which resulted in said drug in said vial being misbranded while held for sale, in violation of Title 21, United States Code, Section 331(k).

Donald E. Kelley, United States Attorney for the District of Colorado.

[fol. 4]

In United States District Court

Arraignment and Plea—May 24, 1957

On the 24th day of May, 1957, The United States of America appeared by James C. Perrill, Assistant United States Attorney and the defendant appeared in person and by his counsel George J. Francis, Esq., before the Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, and the defen-

dant waived the reading of the information, and entered his plea of not guilty to Counts 1, 2, and 3.

Entered on the Docket May 24, 1957.

IN UNITED STATES DISTRICT COURT

VERDICT—September 30, 1957

We, the jury in the above entitled case, upon our oath do say, we find the defendant Howard R. Marshall guilty as charged in count one of the information herein.

Dorothy T. Cleland, Foreman.

Filed September 30, 1957.

IN UNITED STATES DISTRICT COURT

VERDICT—September 30, 1957

We, the jury in the above entitled case, upon our oath do say, we find the defendant Howard R. Marshall guilty as charged in count three of the information herein.

Dorothy T. Cleland, Foreman.

Filed September 30, 1957.

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed October 5, 1957

The Defendant moves the Court to grant him a new trial for the following reasons:

[fol. 5] 1. The Court erred in denying defendant's motion for acquittal as to the first and third counts of the information at the conclusion of the evidence.

2. The Court erred in charging the jury.

3. The Court erred in not admitting into evidence defendant's exhibit A.

4. The defendant was subjected to prejudice and deprived of a fair trial by reason of the following: the reading of newspaper accounts relative to the defendant's background by members of the jury.

5. The Court erred in denying the defendant's motion for a mistrial.

6. The Court erred in not directing a judgment of acquittal on Counts 1 and 3 when the evidence proved entrapment and the Government did not offer, nor have to offer, rebuttal evidence.

7. The verdict is not supported by substantial evidence.

George J. Francis, Attorney for Defendant.

Filed October 5, 1957.

IN UNITED STATES DISTRICT COURT

MOTION IN ARREST OF JUDGMENT—Filed October 5, 1957

The defendant moves the Court to arrest the judgment for the following reasons:

1. The information does not state facts sufficient to constitute an offense as to counts 1 and 3.

2. The Court is without jurisdiction of the offense in that there was no showing of interstate commerce and that if the evidence is considered as establishing interstate [fol. 6] commerce by reason of the construction of the statute involved, then to that extent said statute is unconstitutional.

George J. Francis, Attorney for Defendant.

Filed October 5, 1957.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION IN ARREST OF JUDGMENT AND FOR A NEW TRIAL—October 28, 1957

This Matter coming on for hearing on this 25th day of October, 1957, upon defendant's motions in arrest of judg-

ment and for new trial, the defendant appearing in person and by George J. Francis, his counsel, and the plaintiff appearing by Robert S. Wham and James C. Perrill, Assistant United States Attorneys for the District of Colorado, and the Court having heard arguments of counsel and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the defendant's motions in arrest of judgment and for new trial be and the same are hereby denied.

Dated at Denver, Colorado, this 28th day of October, 1957.

William Lee Knous, Chief Judge, United States District Court.

Entered on the docket October 28, 1957. G. Walter Bowman, Clerk.

In United States District Court

Judgment and Commitment (Rev. 7-52)—October 25, 1957

On this 25th day of October, 1957 came the attorney for the government and the defendant appeared in person and by George J. Francis, his counsel,

[fol. 7] It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to each of Counts I, II and III, and a verdict of guilty as to each of Counts I and III of the offenses of misbranding through indiscriminate dispensing of drugs without prescription in violation of 21 U.S.C. 331 and 333, as charged in the Information herein, Count II having previously been dismissed by order of Court;

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months upon each of Counts I and III of the Information herein, said periods of imprisonment to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous, United States District Judge.

Entered on the docket October 25, 1957.

In United States District Court

Notice of Appeal—Filed November 4, 1957

Notice is hereby given that Howard R. Marshall, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment and sentence of this Court entered on October 25, 1957.

George J. Francis, Attorney for Appellant.

Filed November 4, 1957.

[fol. 8]

In United States District Court

Amended Notice of Appeal—Filed December 2, 1957

The Appellant's name is Howard R. Marshall and his address is 768 Colorado Blvd., Denver, Colorado.

Appellant's attorney is George J. Francis with offices in the Farmer's Union Bldg., Denver 3, Colorado.

The offenses involved are "Misbranding Through Indiscriminate Dispensing of Drugs without Prescription" in violation of Title 21, United States Code, Section 331(k) on or about April 23, 1956, and on or about May 1, 1956.

The Judgment of this Court dated October 25, 1957, was that the Defendant be imprisoned for six months for each of the above Counts, to be served concurrently.

The above named Appellant hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated in Denver, Colorado, this 2nd day of December, 1957.

George J. Francis, Attorney for Appellant.

Filed December 2, 1957.

[Clerk's note: An order was entered December 4, 1957 extending the time to docket the appeal to January 3, 1958.]

IN UNITED STATES DISTRICT COURT

Transcript of Trial Proceedings

ROBERT E. KEATING, a witness called on behalf of the Government, being duly sworn, testified as follows:

[fol. 9] Direct examination.

By Mr. Perrill:

Q. State your name, please.
A. Robert E. Keating.
Q. Where do you live?
A. 1191 Galena Street in Aurora, Colorado.
Q. What do you do?
A. I am an Inspector for the United States Food and Drug Administration.
Q. What is the location of your employment?
A. Denver, Colorado.
Q. How long have you been so employed?
A. Approximately 7 years.
Q. Continuously?
A. Yes, sir.
Q. Would you describe for us briefly the nature of your duties as Inspector for the Food and Drug Administration?
A. As an Inspector for the Food and Drug Administra-

tion, I am to make factory inspections of firms in the manufacture of food, drugs and cosmetics; to collect samples of these products and to make certain other investigations to determine if there is violations of the Food, Drug and Cosmetic Act.

Q. Do you know the defendant, Mr. Keating?

A. Yes, sir.

Q. By what name, if any?

A. Mr. H. R. Marshall.

Q. Can you tell us where he is seated here in the courtroom?

A. He is this gentleman in the light brown suit at the defense table.

Q. Do you recall when you first met him?

A. Yes, sir.

Q. When and where was this?

A. I first met Mr. Marshall here in Denver on the evening of April 18, 1956.

Q. Where was this?

A. This was in the Castle League Guest House at 475 East 10th Avenue in Denver, Colorado.

Q. Who else was present at that time?

A. Mr. Marshall and Mrs. Marshall and the person who introduced me to them, a man by the name of Robert Anderson.

Q. Did you have any conversation within the presence of the defendant at that time?

A. Yes, sir.

Q. What nature of conversation?

A. It was purely a social conversation.

Q. Now, directing your attention, Inspector Keating, to the date April 23, 1956, I ask you whether or not you saw the defendant on that day?

A. Yes, sir, I did.

Q. Where?

A. At the same location as on the previous visit, this was in the Castle League Guest House in Denver, Colorado.

[fol. 10] Q. Did you have occasion to have a conversation with the defendant at that time?

A. Yes, sir.

Q. Who else, if anyone, was present?

A. At the beginning of the conversation only Mr. Marshall and I were together, and later we retired to his apartment where his wife was present.

Q. Would you tell us the conversation you had with the defendant at that time; that is, tell us what you said and what he said?

A. Upon my arrival at the apartment house I called at their apartment; that is, the Marshall's apartment. I spoke first with Mrs. Marshall, asking for Mr. Marshall. She told me he was——

The Court: You needn't tell what Mrs. Marshall said.

Mr. Perrill: Just in the presence of Mr. Marshall.

A. (Continuing) I sought out Mr. Marshall on the lower floor of the—in the dining room, and after exchanging greetings and engaging in a little social conversation, I explained that I was having to drive to Dallas, Texas, that evening, and requested he provide me stay-awake pills to help me in this traveling.

At the end of my request—statement, he stated to me that I should obtain some No-Doz tablets and take these while driving to Texas, and drink coffee in the connection of taking these tablets.

I told Mr. Marshall that I believed I had tried these similar tablets at least on other occasions. They had not provided the desired effect and I had hoped I could get something different this time. He again stated that I should use the No-Doz tablets and drink plenty of coffee during my trip to Dallas, and I turned the conversation to other matters.

I asked him if he had a map of the area between here and Dallas and he said that he did. After this we retired to his apartment on the first floor of the building where Mrs. Marshall was present and he obtained the map. We went over this map together and engaging in social conversation we mapped out what we thought was a proper route for me to take.

After this was over I bid them good-by and left the apartment. I walked out of the apartment and out onto the sidewalk. As I reached the sidewalk Mr. Marshall [fol. 11] hailed me. I turned and saw him standing on the

porch. He said for me to wait for him, which I did. As he came up to me on the sidewalk he handed me a small package comprised of tissue paper or toilet tissue wrapped with a rubber band.

He told me that there were some tablets and some capsules in this package and he told me to use them on my trip to Dallas. He told me to use the tablets during the trip and that if I felt nervous after I arrived in Dallas I should take the two capsules.

Q. What did you do after that?

A. Well, after this I left Mr. Marshall's presence, went to the car and drove a few blocks away and opened the package.

Mr. Francis: I object to any testimony as to what the witness did subsequent to leaving the presence of the defendant.

The Court: I didn't understand.

Mr. Francis: I object, your Honor, to any testimony of this witness with respect to his actions out of the presence of the defendant.

The Court: That would be—the objection is overruled.

Q. Inspector Keating, state what, if any, conversation you had with the defendant at this time, April 23rd, that you have testified, during your talk with him relative to having a prescription for the substance that he gave you?

A. There was no conversation of this nature.

Q. What, if any, prescription did you give him at that time?

A. I gave him no prescription.

Q. What, if any, discussion was there with the defendant?

The Court: You are leading the witness. You asked him what the discussion was and he can tell the whole conversation, without asking him was there any talk about this or any other thing. Let him say what happened.

Mr. Perrill: Excuse me a moment, your Honor.

[fol. 12] The Court: The law requires that the whole conversation be given, not certain portions of it selected by counsel. The jury is entitled to hear the whole conversation.

Mr. Perrill: All right, sir, thank you.

Q. Now, when you arrived at your car as you testified, at that time, what did you do?

A. Well, as I have said, I opened the package and found inside five yellow tablets, rounded shape and acored (sic) across the center. By scoring, I mean there was a groove or indentation across its full width. After noting the contents, I placed the five tablets in a small paper envelope which I sealed and then applied an official Food and Drug Administration seal with the sample number, 51-539M and the date and my initials, or, my name, and I kept this sample in my possession throughout the balance of the evening and the following morning after 8:00 o'clock I submitted this sample to the Denver District Laboratory for the Food and Drug Administration in the New Customhouse Building, Denver, Colorado.

(Envelope marked Government's Exhibit No. 1 for identification.)

Mr. Perrill: Let the record show that at this time I break open envelope marked for identification as Government's Exhibit 1, which had the seal "William V. Eisenberg" thereon.

The Court: The exhibit, if admissible, will speak for itself. That remark will be disregarded.

Mr. Perrill: It was in that condition when I broke it.

The Court: You are not testifying, you are not under oath. If the exhibit is admissible somebody can testify what it is and the markings on it.

Mr. Wham: What counsel is trying to say was that at the time he broke open the envelope in the presence of the Court here, he broke the seal which had the marking "William V. Eisenberg" on it. That is all he wished the record to show.

[fol. 13] The Court: The jury will disregard it. That will appear if it is admissible.

(Envelope marked Government's Exhibit No. 1-A for identification.)

Q. Inspector Keating, I hand you what has been marked for identification purposes as Government's Exhibit 1-A. Can you tell me what that is?

A. Yes. This is the envelope which I have just described that I identified and sealed in the fashion that I described. I can identify it by the seal which bears the sample No. 51-539M.

The Court: It has been admitted in evidence, you have described it.

Mr. Perrill: Let the record show I remove from the envelope marked for identification as Government's Exhibit 1, a vile. (sic)

Q. I hand it to you, Agent Keating, and——

The Court: You better have it marked with some number.

(Vile (sic) marked Government's Exhibit No. 1-B for identification.)

Q. —which I have caused to be marked as Government's Exhibit 1-B for identification, I hand you this and ask you what that is?

A. This is a vile (sic) bearing a label. Now, do you want me to describe what is on this label?

The Court: You can tell him what it is.

A. (Continuing) It is a vile (sic) containing a tissue package, or wad of tissue, and the tissue contains some whole and some pieces of some yellow tablets.

Q. Now, with respect to the contents of what has been marked for identification Government's Exhibit 2, have you seen that before?

A. Yes, this tissue paper bears the——

Mr. Francis: Your Honor, I believe the exhibit was identified as 1-B.

[fol. 14] Mr. Perrill: I mean Exhibit 1-B, that was my error.

Mr. Francis: I would object to testimony as to the contents of it.

The Court: He has to testify as to what it is. The objection is overruled.

A. (Continuing) This tissue is the one I received from Mr. Marshall on the evening of the 23rd of April, 1956, and

I recognize it is because I identified it at that time and these tablets appear to be——

Q. How did you identify it?

A. I identified it with the sample number, the date and my initials, and the one whole yellow tablets appears to be of the same type that I received from the defendant on that occasion.

Q. What did you do with the tissue and the contents in it?

A. The tissue was identified as I previously explained and the tablets were left inside the tissue and the tissue was placed in this plain white envelope that I have identified as the one that was sealed by me on that occasion.

Q. You mean what has been marked for identification purposes as Government's Exhibit 1-A?

A. I do, sir, yes.

Mr. Perrill: Excuse me one moment, your Honor.

Q. Then what, if anything, did you do with what has been marked as Government's Exhibit 1-A, the envelope?

A. This is the envelope that I submitted to the Denver District Laboratory of the Food and Drug Administration on the morning of April 24, 1956.

Q. In what condition was the envelope at that time?

A. At that time the envelope was sealed; that is, my seal was unbroken.

Q. I ask you whether or not that seal appears on what has been marked for identification as Government's Exhibit [fol. 15] 1-A?

A. Yes, the seal that I described previously is on this exhibit.

Q. Did you sign your name on that seal, Inspector Keating, that you have referred to?

A. Yes, sir.

Q. Now, Inspector Keating, directing your attention to May 1st, 1956, I ask you whether or not you saw the defendant on that day?

A. I did.

Q. Where?

A. I contacted him at his apartment at 440 East 13th Avenue, at Denver, Colorado, on the evening of that day.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Who else, if anyone, was present?

A. Mrs. Marshall and Mr. Marshall were both present.

Q. Would you state the conversation you had at that time, what was said by the respected parties?

A. I was admitted to the apartment by Mrs. Marshall and after exchanging greetings with both of them and a short amount of social conversation, they asked me how my trip to Dallas had been and I told them that I had gotten along very well.

Mr. Marshall then asked me what my problem was and I told him that it was necessary for me to drive from Denver to Los Angeles the following day and that I would like to get a bottle of each of the drugs that he had supplied me previously, perhaps as many as a hundred of each of these drugs to have in the car at all times. Mr. Marshall said he didn't have that many at that time and if I would return later he would have them for me. I asked him if he had to go to the drugstore to get them and he stated that he probably would have to do this. I suggested that I accompany him to the drugstore and thereby save myself a trip, but he requested that I come back either later that evening or the following day. I told him that I would return later that evening, and left.

After an approximate hour and a half's wait I returned to this same apartment at 440 East 13th Avenue, in Denver, [fol. 16] Colorado, and was again admitted to the apartment by Mrs. Marshall. As I entered, Mr. Marshall left the room and went to the rear of the apartment and I engaged Mrs. Marshall in some purely social conversation.

After a wait of perhaps five minutes, Mr. Marshall appeared, he had his coat on, he had a flashlight in his hand, requested that I accompany him outside the building to put his car away. I told Mrs. Marshall good night, that I would see her when I got back and left the apartment with Mr. Marshall.

We went out into the courtyard of the apartment house and as soon as we gained this courtyard he handed me two glass, prescription-type viles, (sic) one containing some more of the yellow tablets and another containing some yellow capsules.

I placed these in my pocket and asked Mr. Marshall how much he wanted for them and he stated that he wanted $15 so, I paid him for these in cash. After some lengthy conversation of a purely social nature I left him standing on the sidewalk, walked across the street, got in the car and drove off.

The Court: I think at this time we will take a 15-minute recess.

Ladies and gentlemen of the jury, you will bear in mind that you should not discuss the evidence in this case until you have heard all the evidence and the arguments of counsel and the instruction of the Court and retire for your final deliberation.

Also, of course, you should not talk to any other person about the case nor permit anyone to talk to you about the case. So, you bear those admonitions in mind, not only this recess but any subsequent recess in the case.

After Recess.

The Court: You may proceed.

Mr. Perrill: Thank you, your Honor.

Q. Inspector Keating, prior to recess you had just told us that you had left the defendant Marshall and had pro-[fol. 17] ceeded to your automobile, I believe. Would you continue from there, as to what you did?

A. Yes. After leaving Mr. Marshall I entered the car and drove away several blocks and examined the two prescription-type viles (sic) he had supplied me. As I have already described, one contained some yellow tab[illegible] and there were 50 of them, and, again, they were the yellow-colored, round-shaped tablets with the score of depression or groove running across the width, and in the other vile (sic) I found 24 small, yellow capsules.

These yellow capsules were returned to the vile (sic) and the vile (sic) placed in a small, white paper envelope and sealed and I then applied an official United States Food and Drug Administration seal, No. 58-801M, signed with the date, 5-1-56, and my name, Robert E. Keating.

The 50 tablets were returned to their original container, this prescription-type vile (sic) was also placed in another white envelope and sealed and an official United States Food

and Drug Administration seal with No. 58-802M, the date, 5-1-56, and my name, Robert E. Keating, placed thereon.

I kept these two samples in my possession throughout the evening and on working hours the next morning I submitted them to the laboratory, United States Food and Drug Administration, New Customhouse, in Denver, Colorado.

(Envelope marked Government's Exhibit No. 2 for identification.)

Mr. Perrill: Let the record show I have broken open the envelope that has been marked for identification as Government's Exhibit 2 and removed therefrom a white envelope.

Will you mark that 2-A?

(Envelope marked Government's Exhibit No. 2-A for identification.)

Q. I hand you what has been marked for identification as Government's Exhibit 2-A, which I have heretofore removed from what has been marked for identification as Government's Exhibit 2, Inspector Keating, and I ask you what that is?

A. This is the envelope that I have previously described [fol. 18] as containing the sample 58-805M.

Mr. Perrill: Let the record show I take from what has been marked for identification Government's Exhibit 2-A, a small vile. (sic) I ask you to mark that Government's Exhibit 2-B.

(Vile (sic) marked Government's Exhibit 2-B for identification.)

Mr. Perrill: Let the record show I remove from what has been marked for identification purposes as Government's Exhibit 2, a small vile (sic) which I ask you to mark as Government's Exhibit 2-C.

(Vile (sic) marked Government's Exhibit 2-C for identification.)

Mr. Perrill: Let the record show I remove from what has been marked for identification Government's Exhibit 2, a small bottle which I request you to mark Exhibit 2-D.

(Bottle marked Government's Exhibit 2-D for identification.)

Q. Inspector Keating, I hand you what has been marked for identification purposes as Government's Exhibit 2-B. I ask you to tell me, if you know, what that is.

A. Well, I don't recognize this, sir. This is something that was done by someone else after I turned the sample in. This appears to be the yellow capsules of the type I obtained.

The Court: You needn't express an opinion unless you can identify it.

Q. Now, I hand you what has been marked for identification as Government's Exhibit 2-C, and I ask you, if you know, what that is?

A. No, sir, I don't recognize this vile (sic) either.

Q. I hand you what has been marked for identification purposes as Government's Exhibit 2-D. I ask you if you [fol. 19] have seen that before?

A. No, sir, I don't recognize this either.

Mr. Perrill: All right, sir. May I have a moment, your Honor?

Q. Inspector Keating, I hand you what have been marked for identification as Government's Exhibits 2-B, 2-C and 2-D, and I ask you to open first what has been marked Government's Exhibit 2-B and examine the contents thereof, and state whether or not you know what the contents are?

The Court: He stated he didn't know what the exhibits were.

Mr. Perrill: He said he couldn't——

The Court: He said he couldn't identify the exhibits.

Mr. Francis: That was my understanding.

Mr. Perrill: I handed him the bottles, he said he couldn't identify the bottles.

The Court: You asked him what the exhibit was and he said he couldn't identify it. The record will speak for itself if I am not mistaken.

Mr. Perrill: In that case, I would like to be given an opportunity to examine the defendant as to what it is with respect to the exhibits that he cannot identify.

Mr. Francis: I don't understand that.

The Court: I don't know where we are getting but I observe from here the contents is what you are asking him, what the contents are, how can they be identified, if I got five tablets, these are the five tablets I got from some other identification.

Mr. Perrill: The witness may say they appear to be the same.

The Court: You may proceed and you may object properly. He testified he put the tablets in a certain envelope and there is no showing how they got in the other place. [fol. 20] He has testified that he placed the tablets that he got and capsules in an envelope, didn't he?

Mr. Perrill: Yes, sir. I think he further testified that he placed them in two viles (sic) and then placed those in an envelope.

The Court: You said he couldn't identify the viles. (sic)

Mr. Perrill: My recollection is he didn't testify as to the contents. I simply wish to ask him whether the contents of the respective viles (sic) appear to be the same.

The Court: Is it just a guess or can he? I expect it goes to the weight of his testimony. Go ahead, and you can object. I don't quite understand what you are trying to do.

He has already testified he couldn't identify those exhibits.

Mr. Perrill: Well, your Honor, the witness has testified that he couldn't identify the exhibit as, of course, as it is constituted now. I would simply like for him to inspect the contents closely and have him testify that——

The Court: I don't know how he is going to identify a tablet unless there is some identification. You can go ahead for your record.

Q. I hand you what has been marked for identification Government's Exhibit 2-B. I ask you to open that and in-

spect the contents and tell me whether or not you have seen them before?

Mr. Francis: I object to that question,——

The Court: Well, go ahead.

Mr. Francis: —on the grounds that he has already testified that he cannot identify the particular exhibit.

The Court: I think I will let him answer the question. [fol. 21] The big question is when we come to the admissibility in evidence.

A. Well, as to these actual ones before, I couldn't say, they appear to be the type I purchased.

Q. The ones you testified about?

A. Yes.

Q. Handing you what has been marked for identification Government's Exhibit 2-C, I ask you to inspect closely the contents of that object and tell me whether you have seen these before?

A. I would have to answer this question, the same ones, they appear to be the same type I purchased from the defendant on May 1st.

Q. Now, I hand you what has been marked for identification as Government's Exhibit 2-D, and I ask you to examine the contents thereof and tell me whether or not you have seen those before?

A. My answer to this question would be the same again. As to whether or not these are the actual capsules, I cannot say, but they appear to be of the same type as those purchased from the defendant on May 1st, 1956.

(Envelope marked Government's Exhibit 3 for identification.)

Mr. Perrill: Let the record show that I have in my hand what has been marked for identification as Government's Exhibit 3, the same being a larger white envelope, and let the record further show that I break the seal as to said envelope and I remove therefrom a smaller white envelope which I ask to be marked Government's Exhibit 3-A.

(Envelope marked Government's Exhibit 3-A for identification.)

Q. Inspector Keating, I hand you what has been marked for identification as Government's Exhibit 3-A, and I ask you to tell us, if you know, what that is.

A. Yes, I do.

[fol. 22] Q. Tell us what it is.

A. This is the envelope in which I placed the vile (sic) of the 50 yellow tablets that I have previously described as being purchased from the defendant on the evening of May 1st, 1956, and this vile (sic) here.

Mr. Perrill: Just a moment. Let the record show the witness has removed therefrom a vile (sic) which I ask be marked Government's Exhibit 3-B.

(Vile (sic) marked Government's Exhibit 3-B for identification.)

Q. Now, I return to you what has been marked for identification as Government's Exhibit 3-B, and continue with the conversation referring to the identification of what has been marked Government's Exhibit 3-B, as such.

A. Yes, I removed it from the envelope and find that it is the vile (sic) that I placed in this envelope on that occasion.

Q. How do you know that?

A. Because of the type of prescription container that it was. It's a heavy, glass-type container with a white, plastic lid that I recall as being placed in this envelope by me on that date.

Q. All right, continue. What did you do with what has been marked as Government's Exhibit 3-B?

A. It was placed in this envelope by me on the evening after leaving Mr. Marshall's apartment and the envelope sealed and the official United States Government seal, dated 5-1-56, No. 58-802M, and my name, Robert E. Keating, was placed on it.

Q. Now, I ask you whether or not you are referring to what has been marked as Government's Exhibit 3-A, as that envelope?

A. I am. I kept this in my possession and submitted it to the Denver District Food and Drug Laboratory the following morning.

[fol. 23] Mr. Perrill: One moment, please, your Honor.

Q. Again, Inspector Keating, I hand you what has been marked for identification as Government's Exhibit 3-B, the same appearing to be a vile, (sic) and ask you to open and inspect the contents and tell me, if you know, what the contents are?

A. There are some round, yellow, scored tablets.

The Court: The jury can see that. See if he knows what they are. Anybody can see what they are; I mean, that they are round, yellow tablets.

A. As to what they are, I don't have the knowledge, I don't feel qualified as to pass on what they are.

Q. I ask you whether you have seen them before?

A. Yes, as I have already described that this type of tablets was in the vile (sic) when I received it and the vile (sic) is familiar to me because of its construction and it was placed by me in this envelope.

Q. What did you do with this envelope?

A. I sealed it up and turned it in to the laboratory.

Q. By that you mean what has been marked as Government's 3-A?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. Now, Inspector Keating, I hand you again what has been marked as Government's Exhibit 2-A. Would you state for us——

The Court: He has already testified that that was the envelope that he put these other items in and gave to the laboratory.

Mr. Perrill: I wasn't sure I had covered that.

The Court: You have testified to that, Mr. Keating?

The Witness: Yes.

[fol. 24] Mr. Perrill: That is my error, your Honor. I withdraw the question.

Your Honor, at the risk of repetition——

Q. Referring to what have been marked as Government's Exhibits 1-A, 2-A and 3-A, which I herewith hand to you, I ask you whether or not your seal appears on each of these exhibits?

The Court: Well, he has testified to that. The Government is not entitled to keep repeating the same testimony. If there is any question about it, look at the record. The thing is so confused already. Ask him if he has already testified about that.

Mr. Perrill: Well, again, your Honor, it is a matter of recollection.

The Court: Well, go ahead and ask him whatever question you wish to ask him.

Q. I ask you whether or not the three envelopes, Government's Exhibits 1-A, 2-A and 3-A, whether you recognize your seal on these respective envelopes?

A. Yes, I do.

Q. And how do you recognize these respective seals?

A. Because they bear my handwriting, my name, the sample numbers and the date applied by me personally when the samples were made up.

Q. All right, sir, thank you. Inspector Keating, referring to your previous testimony as to all capsules and tablets you stated you received from the defendant, I ask you whether or not you had a prescription for any of these?

A. I did not.

Q. I ask you whether or not there was any discussion between yourself and the defendant concerning this matter of a prescription?

A. There was no discussion.

Mr. Perrill: Your witness.

[fol. 25] Cross-Examination.

By Mr. Francis:

Mr. Francis: If the Court please.

Q. Now, Mr. Keating, when is the first time you had any dealings with the defendant as regard any capsules or tablets?

A. On the evening of April 23, 1956.

Q. You recall at a previous time testifying under oath that you had some dealings with the defendant on April 24, 1956?

A. Yes, sir. On that occasion it was a mis-statement of the date by me.

Q. And the correct time then is April 23, is that so?

A. Yes, sir.

Q. Now, on April 23 you testify that you received some objects in a tissue-paper container, is that correct?

A. That is correct, sir.

Q. And you have already identified that in Court this morning, is that not so?

A. Yes, sir.

Q. You testified at the same time that those objects, whatever they were, were in that tissue-paper-type package, and also wrapped with a rubber band, is that not so?

A. Yes.

Q. Where is that rubber band?

A. I discarded it.

Q. You are absolutely sure there was a rubber band?

A. Yes, sir.

Q. Why is it you discarded it?

A. It being too small to identify, and I felt that it didn't add materially or distract (sic) materially either its presence or absence, and I merely discarded it.

Q. You could have placed it in the envelope as easily as you did the tissue paper that you had, could you not?

A. Oh, yes, I could have.

Mr. Perrill: Could you speak up just a little bit, Inspector Keating?

[fol. 26] Q. On April 23rd, that was the second time you had seen the defendant Mr. Marshall?

A. Yes.

Q. And at that time you told him that you wanted some stay-awake pills?

A. That's right.

Q. And he told you you should have a prescription for pills of the kind you wanted, did he not?

A. No.

Q. Do you recall clearly your entire conversation that evening with respect to pills or stay-awake pills?

A. Yes. I had asked him for these stay-awake pills, as you mentioned, and without any reference to a prescription at all, he said that I should use No-Doz and drink coffee.

Q. And you answered that No-Doz and coffee would not work?

A. Well, I told him that I had used something which I felt was the same thing. I felt I had used this before and it hadn't produced the desired effect.

Q. Had you actually used No-Doz and coffee for what you had in mind?

A. You mean previously?

Q. Yes, sir.

A. No.

Q. How were you dressed at the time you went to see Mr. Marshall on April 23rd?

A. I had on some slacks and a sport shirt and a jacket.

Mr. Wham: If the Court please, I think this all is immaterial unless the defense intends to raise——

The Court: I don't know what you intend to raise. I will overrule the objection. He has a latitute (sic) about how he was dressed. The objection is overruled and you can answer the question.

A. (Continuing) I was wearing some slacks and a sport shirt and a jacket.

Q. And you told him your occupation was a salesman of some sort?

A. Yes, I did.

Q. Were you a salesman?

A. No, I wasn't.

[fol. 27] Q. And you told him you were going to go to Texas?

A. Yes, that is right.

Q. Were you going to go to Texas?

A. No, sir.

Q. Did you go to Texas?

A. No, sir, not at that time I didn't.

Q. Did you tell him you needed these pills,——

A. I told him——

Q. —the stay-awake pills?

A. I told him I wanted to use them to help me drive to Dallas that evening.

Q. In other words, you told him that you were sleepy or would need them because of your need to stay awake?

A. No, I told him I wanted to use them driving to Dallas. I asked him if he could get me stay-awake pills to drive to Dallas.

Q. You told him you needed stay-awake pills, is that not so?

A. I asked him if he could get me some.

Q. Did you tell him you needed some?

Mr. Wham: If the Court please, I object to that unless they are raising the question of entrapment.

The Court: He has testified to what he said. You needn't pursue that further. He has answered the question several times. That will be a question for the jury to pursue.

Q. First, the second time you went there, did you go with Mr. Anderson, Mr. Robert Anderson?

A. Now, we are referring to the evening of April 23rd?

Q. Yes, sir.

A. No, sir, I went alone.

Q. You had previously gone with Anderson, is that correct?

A. That is correct.

[fol. 28] Q. And he introduced you as a salesman of some kind?

A. Actually he introduced me as a friend of his.

Q. I see. And then you introduced yourself as a salesman?

A. That's right.

Q. And then as I recollect you stated that you and Mr. Marshall discussed the best routes to drive to Texas and that he produced some maps?

A. A map.

Q. A map?

A. Yes, sir.

* * * * * * *

The Court: I think we will recess now until 1:30, and ladies and gentlemen, you will bear in mind the admonitions I have given about not discussing the case until you have heard all the evidence and retire to the jury room and also, of course, you should not talk to anyone about it or permit anyone to talk to you about it.

* * * * * * *

[fol. 54] The Court: We may as well recess until tomorrow morning at 9:30. You will observe during this recess the observations I have made about the impropriety of discussing the case among yourselves until you have heard all the evidence, or letting anyone talk to you.

So, with those admonitions, you may announce a recess until 9:30 in the morning.

* * * * * * *

In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Francis: There was a matter I wanted to bring up before Court opened, that is that there are two articles in the newspapers, onein (sic) yesterday afternoon's Denver Post, and the other in this morning's News, both of which describe the past criminal record of this defendant. I noticed when I came in this morning, as I walked by the jury room, that jurors had several Rocky Mountain News and were huddling around reading it.

[fol. 55] I would like to determine whether or not the jurors have been reading the articles in question. I believe the Court has admonished them not to do so.

The Court: I saw the articles, and where did the information come from?

Mr. Wham: As far as I know, your Honor, on the past record, I don't have any information.

The Court: The intimation is from the—could be that it must have come from the Government. They couldn't have gotten it without getting it from the Government. That is my first thinking.

Mr. Wham: I know this much about it, Judge. I don't know anything about the article that appeared in the Denver Post. As to the article in the Rocky Mountain News, I was called last night by Al Nakkula before I left the office.

He told me they had a request from Oklahoma for some information about the trial, asked me to tell him what happened at the trial, that he wanted to relay it down to Oklahoma.

I told him what appears in the first and second paragraphs, about Robert Keating's testimony and Don Taylor's testimony.

I didn't tell him anything about the Defendant's past record. Now, he did ask me, after I told him that, about a magazine article that appeared in Coronet Magazine that he said had something to do with the Defendant's prescribing some drugs for this Hank Williams. I told him I had not read the article and didn't know anything about it.

Mr. Hardey: Mr. Ralph Horst, Chief of the Denver District Food and Drug Administration, tells me he got a telephone call from a reporter asking for information regarding the Defendants past convictions and that he told the reporter that he could not make any comment about this matter during the course of the trial, that he gave him absolutely no information. That is as far as I know about it. [fol. 56] I personally have not seen a reporter and have given no information at all.

The Court: Would you have any information about it?

Mr. Perrill: I don't, your Honor, I was not contacted relative to—by the newspapers.

The Court: As all of you know, we have had once or twice in the past something that has occasionally—an episode like this, and that sometimes it came from something the District Attorney had said or something of that sort, and I didn't feel that any counsel would give this information.

That was my feeling, but it did seem by the nature of it that it must have been obtained from somebody—well, that had considerable information about the case.

Now, it may be that there has been enough publicity in Oklahoma that they have related the information up here. It wasn't something that an ordinary reporter knows unless somebody told him. On the prior convictions, both of them mentioned that. That would only be available to a reporter through quite a bit of research and checkup. Somebody must have told him.

Mr. Perrill: One of the convictions was an Oklahoma conviction.

Mr. Wham: Two of them.

Mr. Hardey: There is this possibility, that this mandid (sic) go to trial in Oklahoma on second offense, and the Oklahoma District Attorney may well have gathered that information in preparing for the trial.

That is just a speculation. The reporter might have gathered the information.

The Court: One of the convictions, according to the—that is the Post article—was that he was convicted of forgery in Oklahoma.

Mr. Hardey: That was an Oklahoma offense.

[fol. 57] The Court: The article in the newspaper says he has a record of two felony convictions and then they recite, "1953, while serving a forgery sentence in the State Penitentiary, he testified before State Legislative Committee studying new drug laws for Oklahoma."

The thing about him giving the drug to Hank Williams would be the dangerous one. The fact that he testified before a legislative committee wouldn't be very prejudicial.

Mr. Hardey: There are two Oklahoma convictions, one for forgery and one of illegal possession of barbituates.

The Court: Was that a felony?

Mr. Hardey: Yes.

The Court: The only thing that is identified is a forgery in both of them. I don't know, I expect the only thing to do is possibly interrogate the jury about whether they have read it and whether having read it they think they can go ahead and render a fair and impartial verdict.

If they answered they couldn't give him a fair trial or something of that sort—I don't know whether the jury better be interrogated in the Courtroom all together or brought in here one by one, I don't know.

Mr. Wham: This is the first time I have ever run up against this situation.

Mr. Hardey: I have had it happen once before in St. Louis.

The Court: How did it happen there, how did they do there?

Mr. Hardey: The jury was reading the newspaper in the jury box during the noon recess and the defense attorney raised a question when the Judge came in and the Judge tore into the jury with vigor.

The Court: Sometimes I do. I never anticipated it, that [fol. 58] this case would have any newspaper publicity at all. The case that you could anticipate that you could have publicity would be a murder trial, but I generally tell the jury to not read the newspapers or not listen to any tele-

vision broadcasts, but it never occurred to me that this case would get any newspaper publicity and, of course, I didn't tell them that.

I mean, the jury is not quite in the same fix as if I had told them not to read the newspapers, but without any warning on my part along that line, they may have read the paper, and I think the question now is whether this has been sufficiently prejudicial that they could not proceed to determine the verdict from the evidence and what they hear at the trial and disregard this entirely.

A good many times on account of prejudice, this, that and the other thing, on account of a prejudicial account, most fear that. It is amazing how many people haven't read the newspaper.

On the case I just mentioned, the Smalldone cases had as much publicity as has ever been tried here. My memory is that three-fourths of the panel had read nothing but the headlines.

Mr. Hardey: The Judge polled each member of the jury in the box on whether they had read the newspaper and when they said they had read it, whether it would prejudice them and if they could give them a fair trial.

The Court: We can do it that way or do it one by one. My memory on it is and most of my experience on this line has been where there is change of motion on account of the feeling in the community. I think that some of those cases they brought the jury in one by one and interrogated them about the thing.

Mr. Francis: My position would be that I would prefer the individual interrogation of the jurors by the Court in chambers.

The Court: Well, I think we may as well do that. You can bring another chair in, Clarence, and then just go and ask the juror to come in. Start with the number one juror. [fol. 59] There is no necessity of putting them under oath. I think we will just interrogate them.

(The Court interviewed jurors in chambers)

The Court: Do you have any comments to make, anyone, about the situation?

[Clerk's Note: Supplemental record containing the questions to jurors and their answers appears at page 39].

Mr. Francis: I would like to put in a motion——

The Court: All right.

Mr. Francis: —for a mistrial.

The Court: You wish to make a motion for mistrial?

Mr. Francis: Yes, sir.

The Court: All right. I think the motion will be denied. I am satisfied with the interrogation of the jurors—there were only about four of them had read the article in the newspaper—all of them satisfied me they would not be influenced in any way about the item, could proceed and render a fair and impartial verdict from the evidence and the law in the case.

I think the signs of the jurors was very apparent from their answers and their demeanor while they were here, and I feel very confident in my own mind that the matter having been called to their attention, that they will lean over backwards, as a matter of fact, in consideration of the case to stay away from any extraneous matter they may have read or heard or anything else.

Of course, I propose when the instructions come, to reiterate that they should not give any consideration to anything they have read or heard or anything else and should confine their consideration solely to the evidence.

I think the jury was not prejudiced in any way or impressed, as a matter of fact, by the article. I feel that there will be no prejudice of the defendant for the pro-[fol. 60] ceeding of the trial. The motion will be denied.

Mr. Francis: Will the newspaper items be part of our record?

The Court: Yes, I was just going to give those to the Clerk. I tell you what we better do. I was thinking about some way of marking them, but I wouldn't want to get them tangled up with the trial exhibit numbers.

I think it is perfectly evident that the articles were handed to me by counsel. The Denver Post, "Trial Opens On Sale Of Restricted Drugs." The one in the News, "Jury Selected To Try A Man On Drug Charge."

So, those articles, or the items that counsel has handed me, will be placed in the record. I think they are sufficiently identified by this description. All right, you can put them

in the file, Clarence, if you can fasten them together. Is there anything else?

Mr. Francis: No.

The Court: Let's figure on going ahead as quick as we can all get in there.

In Open Court

The Court: All right, the Government may proceed.

Mr. Wham: Thank you, your Honor. I would like to call Mr. William V. Eisenberg, please.

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[fol. 83] Robert E. Keating, a witness recalled by the Government, having been previously sworn, resumed the stand and testified further as follows:

Redirect examination.

By Mr. Perrill:

Q. Are you the same Robert E. Keating who previously testified in this case, I believe it was yesterday?

A. Yes, sir.

Mr. Francis: May the record show an objection on the part of the defendant upon this witness testifying?

The Court: The objection will be overruled for the reasons just given in chambers.

All right, go ahead.

Q. Inspector Keating, just referring your attention to a segment of your testimony yesterday, you stated that on May 1st, 1956, you received 24 capsules from the defendant which were in a bottle?

A. Yes.

Q. Now, subsequent to receiving these capsules in the condition as you have stated, what, if any, report did you have occasion to make?

A. I wrote out an official Food and Drug Administration Collection Report on the morning following the purchase of these drugs.

Q. Where were you at the time of making that report?

A. I was in the Denver District Office of the Food and Drug Administration.

Q. Now, exactly where, if you could state?

A. In the inspectors' room, at my desk.

Q. All right, sir, with relation to where you were at that time, making your report, if you know, where was this bottle containing the 24 capsules that you received [fol. 84] from the defendant as you testified?

A. I had this bottle before me on the desk as I prepared this collection report.

The Court: Let's get this straight. I thought—when did you submit this bottle? You better name this thing, what he did, by exhibits. Go ahead, but it means nothing unless you tie it up.

Mr. Perrill: I will just as soon as I can.

Q. I ask you whether or not you have reviewed this report since testifying in this case yesterday?

A. Yes, I have.

Q. I ask you whether or not reviewing the report has refreshed your recollection with respect to what has been marked for identification as Government's Exhibit 2-D?

A. Yes, it has. The bottle that you have handed me here, Government's Exhibit 2-D, is of the type described by me in the body of this collection report that I have referred to and it's described by me on this report as being a small, asprin-type (sic) bottle.

Mr. Perrill: Just a moment, your Honor, I am trying to think of a word.

Q. Of what degree of clearness, if you can recall?

A. As to the wording of the report, is that what you are referring to?

Q. No, to your recollection?

A. Yes, the report that I reviewed was made by me on May 2, 1956, and since reviewing that report it has recalled to my attention the fact that this bottle appears to be the same one I have described in this report and is the one I have submitted under this sample number 58-801M.

Q. All right, now, and as being of what origin as far as the first time you ever saw it?

A. The origin of this bottle was the defendant Mr. Marshall. This is the bottle that I purchased from him on the evening of May 1st, 1956.

Q. Containing what?

A. Containing a number of yellow capsules, 24 to be exact.

Q. And what did you do with what has been marked for identification Government's Exhibit 2-D?

[fol. 85] A. I placed this in an envelope and sealed it with an official Food and Drug Administration seal. Now, the number that I inscribed on this seal was taken from this collection report, 58-801M, and this number appears both on the collection report and on the envelope which was sealed by me. The seal also bears this same number and my name.

Q. Now, I hand you what has been marked for identification purposes as Government's Exhibit 2-A. What, if any, recollection does this proposed exhibit have to do with what you have in your mind, what has been marked for identification Government's Exhibit 2-D?

A. Well, this envelope, which has been marked as Government's Exhibit 2-A, is the envelope that I prepared at that time and is the envelope which contained this small bottle which has been marked as Government's Exhibit 2-D, the one containing the 24 yellow capsules that I obtained on that evening.

Mr. Perrill: Thank you, sir.

At this time the Government offers into evidence Government's Exhibits 2, 2-A, 2-C and 2-D.

The Court: Put them up here so we can see. Counsel has a right to cross-examine. You can cross-examine. I'll reserve ruling until you cross-examine.

Mr. Francis: I would appreciate cross-examination on the exhibit, your Honor.

* * * * * * *

In Chambers

Motion for Verdict of Acquittal and Denial Thereof

The Court: At the conclusion of the Government's case the defendant as the record shows asked for a verdict of

acquittal on the ground of entrapment including other grounds as will appear from the record made the other day. The Court denied the motion for acquittal, and counsel for the defense has advised that the defense does not intend to interpose any evidence, and the defense has asked for an instruction on the defense of entrapment.

* * * * * * *

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: It seems to me under the case you offer [fol. 86] here that this evidence is not made admissible at all in any sense. There are really two questions involved here. The first is whether you have a right to offer any evidence at all under the circumstances here where the defendant has not taken the stand and where the defendant relies entirely on the testimony of the Government as showing the alleged entrapment. That case that you have just cited that I mentioned here a moment ago says the question is a very doubtful one. Let me see the case, will you, Mr. Francis?

The Court designates the question as one of an interesting nature and very doubtful, that is, with respect to the right to offer any evidence at all. In that case the Court did permit the evidence to be received which was to the effect according to the opinion that, I am quoting the opinion: "The government officers were then permitted to testify, over the defendant's objection, as to statements made by other addicts, prior to the time when the offense was committed, as to having purchased drugs from Siegel, and as to a previous attempt made by the officers to get evidence of a sale by Siegel."

As I understand from the offer of the Government, there is no evidence whatsoever that this defendant ever dispensed without a prescription any of these drugs in this category to anyone. The gist of the Government's offer would seem to be directed to the fact that he was holding himself out as a physician and things of that sort. If the trial was on the issue of his having claimed to have been a physician and the charge against him was he was practicing medicine without a license, there might

be some pertinency to that evidence, but as the matter stands the effect of the evidence would be it would not reflect on the question of entrapment, because there is no showing whatsoever of any similar transaction or one here under consideration but simply the charging of the defendant on some other angle.

It would be just like offering evidence that he picked pockets or was a petty thief or something of that sort which would have no bearing on the issue and would tend to raise a collateral issue and I think would be prejudicial to the defendant. As I understand it, and I will ask counsel for the Government so there will be no mistake, there is [fol. 87] nothing in this evidence whatsoever that relates to an alleged dispensing by this defendant of any drugs or articles of the type involved in this case at all, is there?

Mr. Wham: Well, not of the exact same description, no, Judge. We feel, however, that the circumstances showing the practice in Oklahoma, which included the dispensing of drugs admitted by the defendant together with the circumstances here showing the defendant's access to a supply of drugs through a drugstore, which he was interested in, show that the agent had reasonable cause to suspect that the defendant may be engaged in criminal activities here.

The Court: There was no showing at the time this trial happened that he had any connection with the drugstore at all than what you offer. That was clear back a couple of years before, was it?

Mr. Francis: I would not. That is all one instruction?

The Court: Yes.

Mr. Francis: The defendant objects and excepts to the instruction as submitted by the Court on one ground, namely, that interstate commerce involves more than the proof or the showing that a drug was manufactured outside of this jurisdiction, and, therefore, that the instruction should properly state that the Government must prove beyond a reasonable doubt the course of travel of the drug, namely, how it came from New York to Colorado. Secondly, the defendant objects and excepts to the instruction in defining dispensing to mean or to including misbranding re-

stating that objection to the notion that the mere dispensing of a drug is misbranding.

The Court: Of course, the statute so provides with respect to the matter. With respect to the first I think the cases are very much in avcord (sic) that the Government doesn't need to show the means of the transportation, the routes or the details of the transportation, that any of these cases involving transportation in interstate commerce all [fol. 88] we have to show is that the item was in a different state and then later showed up in another state. There are a lot of cases holding that way.

EXCERPTS FROM COURT'S INSTRUCTIONS

Now, the statute provides that the act of dispensing this kind of a drug without a doctor's prescription is an act which results in the drugs being misbranded while held for sale. Congress has so defined misbranding. You must as a matter of law accept this definition of misbranding.

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You are instructed that the word "dispensed" as used in the statute and in this information means to deal out or divide out generally either with or without a money consideration. It means the one who has potential ownership or control voluntarily parts with such ownership or control. Thus, in this case in order to find that the defendant dispensed the drug to Robert E. Keating you must find beyond a reasonable doubt that the defendant was in possession, ownership, and control of the drug and voluntarily parted with such possession, ownership, and control by dealing out the drug to Robert E. Keating.

Those are the first two elements. Now, the third element, and there are three elements in the offense, is that you must also find beyond a reasonable doubt in order to return a verdict of guilty that the drugs involved had been shipped in interstate commerce prior to their being dispensed by the defendant. In determining whether they have been shipped in interstate commerce I instruct you that, if you find that any of these drugs had been manufactured outside of the State of Colorado, then they had been shipped in

interstate commerce prior to the time of their alleged dispensing by the defendant.

* * * * * * *

Now, the defendant's counsel, as you have noted from his argument, as an alternative ground for acquittal claims [fol. 89] there was an entrapment in this case. Now, entrapment is defined as the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer. In other words, when the criminal design originates not with the accused but is conceived in the minds of the Government officers and the accused is by persuasion deceitful representation or inducement lured into the commission of a criminal act the Government is estopped by sound public policy from prosecution therefor, and an acquittal is warranted if the jury so believe or have a reasonable doubt with respect thereto. It is well settled, however, that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution as artifice and strategem, and decoys may be employed to catch those engaged in criminal enterprises and to present opportunity to one willing to commit crime. If such is the case, the jury is entitled to reject the defense of entrapment and find the defendant guilty if convinced of his guilt beyond a reasonable doubt.

* * * * * * *

In United States District Court

Order for Inclusion, Certification and Transmittal of Supplemental Transcript—January 30, 1958

This matter coming on upon the stipulation of the parties hereto for the inclusion of a supplemental transcript of record concerning proceedings in the trial of the above case on September 26, 1957; it appearing to the Court that said supplemental transcript is limited to a report of the Court's interrogation of jurors *in camera* concerning their knowl-

edge of certain newspaper articles reporting said trial, and the Court being fully advised in the premises,

It is hereby ordered that the Clerk of the Court certify [fol. 90] and transmit said supplemental transcript to the United States Court of Appeals, Tenth Circuit, for inclusion in the record on appeal.

Dated at Denver, Colorado, this 30 day of January, 1958.

William Lee Knous, Chief Judge, United States District Court.

Filed January 30, 1958

Supplemental Transcript of Proceedings of September 26, 1957

Excerpt of Proceedings had before Honorable William Lee Knous, Chief Judge, United States District Court, District of Colorado, and a Jury, in Denver, Colorado, at the Post Office Building, in Courtroom A, on September 26, 1957, at 9:30 o'clock a. m.

APPEARANCES:

Honorable Robert S. Wham, Assistant United States Attorney, Honorable James C. Perrill, Assistant United States Attorney, District of Colorado, and Leonard Hardey, Esq., Attorney, Food and Drug Administration, appearing for the Government.

George J. Francis, Esq., Attorney at Law, 817 Farmers Union Building, Denver, Colorado, appearing for the Defendant.

EXAMINATION OF JURORS IN CHAMBERS

(Dorothy T. Cleland, Juror No. 16, entered the Court's Chambers.)

The Court: This is no interrogation or anything of that sort, Mrs. Cleland. It appears that there was a piece in the Post last night about this case and also one in the News this morning. Did you happen to read either one of these pieces?

[fol. 91] Mrs. Cleland: No, I didn't. I heard just now that there was a piece but I haven't gotten to the papers.

The Court: You didn't read either one of the papers?

Mrs. Cleland: No.

The Court: From what you heard, was anything said about any of the contents of it?

Mrs. Cleland: No.

The Court: That is all I want to ask you about it.

Mrs. Cleland: All right.

(Dorothy T. Cleland, Juror No. 16, left the Court's Chambers.)

(Clarence Gomer, Juror No. 29, entered the Court's Chambers.)

The Court: Mr. Gomer, it appears that last night in the Post and this morning in the News there were a couple of news items about this case. Did you read these news items, either one of them?

Mr. Gomer: Just a few minutes ago I read this one item in the News.

The Court: Well, now, from what you read in the News about the case, would you be in any way influenced in your consideration or by what you read in the News?

Mr. Gomer: No, sir.

The Court: You feel sure in your own mind that you could determine the case on the evidence you hear in the Courtroom and not use any of the information in this News item in determining the guilt or innocence of the defendant?

Mr. Gomer: Yes, sir.

The Court: You are sure of that?

Mr. Gomer: Yes, sir.

[fol. 92] The Court: Do any of you want to ask any questions?

Mr. Perrill: I wonder whether or not the Court would want to instruct each juror not to discuss the article or its contents as they go back?

The Court: Yes, I think that is proper but I thought I would give them that in the general instruction, not to give consideration to that, but, of course, you shouldn't discuss among yourself anything about this article.

Mr. Wham: I wonder if it might not be in order to instruct or ask each juror if he can discard entirely from his mind——

The Court: That is what in effect I asked him.

You can discard it from your mind and make your determination solely from the evidence you hear from the witness stand?

Mr. Gomer: Yes, sir.

Mr. Francis: I wonder if I might inquire, were you in any way affected so far as your feelings toward Mr. Marshall were concerned, by the article?

Mr. Gomer: No, sir, hardly.

Mr. Hardey: You recognize, of course, that newspaper articles are frequently untrue and not verified and do not necessarily reflect true facts?

Mr. Gomer: Yes, sir.

Mr. Hardey: It might well be the situation here, might it?

Mr. Gomer: Yes, sir.

The Court: Thank you, Mr. Gomer. Mr. Pennington next.

(Clarence Gomer, Juror No. 29, left the Court's Chambers.)

[fol. 93] (Haskell O. Pennington, Juror No. 53, entered the Court's Chambers.)

The Court: Morning, Mr. Pennington, sit down. We are just checking up about a couple newspaper articles that appeared in last night's Post and this morning's News. There were a couple of news items about this case that is on trial right now. Did you read either one of those articles?

Mr. Pennington: Nos, (sic) sir, I didn't.

The Court: Has anyone discussed the items with you, any of the other jurors?

Mr. Pennington: No, sir.

The Court: No one has mentioned to you what was said in the articles or anything of that sort?

Mr. Pennington: No, sir.

The Court: All right, that is all we will want of you, thank you very much.

(Haskell O. Pennington, Juror No. 53, left the Court's Chambers.)

(Aletha May Bowers, Juror No. 11, entered the Court's Chambers.)

The Court: Morning, Mrs. Bowers, sit down. What we are inquiring about is a couple of newspaper articles, one appeared in the Post last night and one in the News this morning concerning the case that is on trial now. I wondered if you have read either one of these articles?

Mrs. Bowers: I didn't see the one in the Post but I did see the one in the News.

The Court: Did you read it this morning?

Mrs. Bowers: Yes, sir.

[fol. 94] The Court: Well, now, is there anything in the article that would prejudice you in any way against the defendant?

Mrs. Bowers: No.

The Court: And if you were to go ahead with the case and the matter is submitted to the jury, you could reach your verdict from the evidence you hear from the witness stand and instructions of the Court?

Mrs. Bowers: That is right.

The Court: And you wouldn't give any regard to what you read in this article at all?

Mrs. Bowers: No.

The Court: You feel confident it wouldn't enter into your figuring at all?

Mrs. Bowers: In fact, I didn't read it too good, I just scanned over it but I did see the article.

The Court: It raised no prejudice in your mind against the defendant?

Mrs. Bowers: No.

The Court: You feel confident you could decide the case and give it the same consideration as if you hadn't seen the article?

Mrs. Bowers: Yes, sir.

The Court: You could exclude from your mind anything you recalled about the article?

Mrs. Bowers: Yes, sir.

The Court: Do any of you wish to ask any other questions? Thank you, Mrs. Bowers. Mr. Sullivan.

[fol. 95] (Aletha May Bowers, Juror No. 11, left the Court's Chambers.)

(John William Sullivan, Juror No. 68, entered the Court's Chambers.)

The Court: Sit down, Mr. Sullivan. We are just inquiring about a couple of items that appeared in the newspapers about this case, one was in the Post last night and one was in the News this morning. I wonder if you read either one of these articles?

Mr. Sullivan: No, sir, we don't get the Post and I hardly ever read the News until I get home at night.

The Court: You didn't read——

Mr. Sullivan: No, sir, just hearsay that there was some article in the paper.

The Court: Did someone tell you that there were some articles?

Mr. Sullivan: No, sir, I just overheard a conversation there was something in the paper about it.

The Court: Did anyone tell you what the paper said?

Mr. Sullivan: No, your Honor.

The Court: From the talk you heard about it, did you form any or get any information about any factual information about the defendant or anything like that?

Mr. Sullivan: No, sir.

The Court: And you haven't any ideas, you don't know at this time even, what the article said?

Mr. Sullivan: No, sir, I never read the newspapers until evening.

[fol. 96] The Court: From what anybody told you——

Mr. Sullivan: No, sir.

The Court: —would there be any prejudice in your mind that would arise against the defendant?

Mr. Sullivan: No, sir.

The Court: Would there be anything that has happened in the way of any information you might have obtained from these hearsay sources that would be a thing that you would consider in reaching your verdict?

Mr. Sullivan: No, sir.

The Court: You would make up your mind what ought to be done from the evidence and from the instructions of the court?

Mr. Sullivan: Yes, sir.

The Court: Do any of you want to ask any questions?

Mr. Francis: May I ask——

The Court: Yes.

Mr. Francis: I would appreciate knowing the sources of this information; that is to say, you merely heard about it, was that in the jury room?

Mr. Sullivan: Coming down on the bus I heard somebody say something that sounded familiar to this case. Is that all?

The Court: Yes. Mrs. Baysdorfer.

(John William Sullivan, Juror No. 68, left the Court's Chambers.)

(Ruth Evalyn Baysdorfer, Juror No. 4, entered the Court's Chambers.)

[fol. 97] The Court: Sit down, Mrs. Baysdorfer.

I am inquiring about a couple of newspaper articles abut (sic) this case, one appeared in the Post last night and then there was one in the News this morning. Did you happen to read either one of these articles?

Mrs. Baysdorfer: Well, the one in the Post I didn't see at all and the one in the News, why, my husband saw it and told me about it and I scanned over it but I couldn't tell you now what the details of it were.

The Court: You don't have in your mind at this time the details of the article?

Mrs. Baysdorfer: No.

The Court: From what your husband told you, was there any feeling in your mind——

Mrs. Baysdorfer: The only thing——

The Court: —that would prejudice you against the defendant?

Mrs. Baysdorfer: The only thing he told me was that the jury had been selected and so many women and so many men and he said "I suppose this means you, this is the case you are on," and he didn't tell me anything further than that and he knew that I am not supposed to read

newspaper pieces and I glanced at the headlines of it and scanned it as I sometimes do and that was it.

The Court: The headlines just simply said "Jury Selected To Try Man On Drug Charge," that is all you saw?

Mrs. Baysdorfer: Yes, sir.

The Court: There is nothing in this experience, I assume from what you have said, that would prevent you from rendering a verdict on the facts as you hear them in the courtroom?

[fol. 98] Mrs. Baysdorfer: Oh, no.

The Court: You are absolutely sure there is nothing that has happened as far as you are concerned that would in any way influence you against the defendant or lead you to consider any of these matters in consideration of the disposition of the case?

Mrs. Baysdorfer: Oh, no, no.

The Court: Does anyone want to ask any further questions? All right, thank you Mrs. Baysdorfer.

(Ruth Evalyn Baysdorfer, Juror No. 4, left the Court's Chambers.)

(William Charles Wyatt, Juror No. 74, entered the Court's Chambers.)

The Court: Sit down, Mr. Wyatt. What we are inquiring about are a couple of newspaper articles, one which appeared in the Post last night and one of which was in the News this morning about this case that is on trial. Did you read either one of these?

Mr. Wyatt: I read both of them.

The Court: You read both of them?

Mr. Wyatt: Yes, sir.

The Court: Would there be anything in the articles that you read that would prejudice you in any way against the defendant?

Mr. Wyatt: I believe not, sir. I didn't really digest either one of them very thoroughly and I discussed the case with no one.

The Court: You know what we are trying to find out is whether there was anything in these articles that would in any way prejudice the defendant in your mind in the [fol. 99] case if the case went on or could you consider the

case in the same way you could have if you hadn't read the articles?

Mr. Wyatt: Yes, I believe I could.

The Court: You feel confident?

Mr. Wyatt: I believe I can honestly say that.

The Court: Could you lay out of your mind entirely what purported to be the factual statements in these items?

Mr. Wyatt: Well, yes, sir, because as I say, I didn't really digest them very thoroughly. I have very little time with the newspaper and in the case of both of these articles, I can hardly tell you what I really read in there, the case names, of course, including the defendant, but other than that I didn't pay too much attention to it.

The Court: As you read it and as you recall it, I gather from what you say, it hasn't formed an impression on your mind anything that would cause you to have an opinion as to how the case would be decided?

Mr. Wyatt: No.

Mr. Francis: Mr. Wyatt, you must realize my position as the defendant's counsel. You wouldn't be criticized if in any way your thoughts were influenced by what you read and if you feel in any way that the articles that you read had any effect on your opinions in the case, I would appreciate—that is to say, if your opinion had become absolutely adverse I would appreciate your stating it, that is to say, if you do feel in any way, no matter how slight a prejudice in this case, then I would appreciate your stating it. If not——

Mr. Wyatt: Well, now, I can only reiterate to you just what I have said to His Honor, that I don't feel that I [fol. 100] digested the articles very thoroughly, either one of them, and to me I read newspaper articles, at the time I think of what I am reading momentarily and then I go to something else and I have left it behind. It is almost like a piece of recreation and it is past and it is over with.

Mr. Francis: That is fine.

Mr. Wyatt: More than that I can't say.

The Court: I think you have answered the question. Thank you very much, Mr. Wyatt.

(William Charles Wyatt, Juror No. 74, left the Court's Chambers.)

(Albert Fenner Bullard, Juror No. 12, entered the Court's Chambers.)

The Court: Morning, Mr. Bullard. What we are inquiring about this morning, I have a couple of newspaper articles that appeared in the Denver papers, one last night in the Post and one this morning in the News about this case. I wonder, did you read either one of these articles?

Mr. Bullard: Yes, sir, I read both of them.

The Court: Did it raise any prejudice in your mind against the defendant?

Mr. Bullard: No, sir.

The Court: Is there anything in the articles that would influence you in any way in considering the case here, in rendering your verdict?

Mr. Bullard: No, sir.

The Court: You are very sure that you could go ahead and try the case and make up your mind what should be done from the evidence you hear from the witness stand and give no consideration whatever to these newspaper articles?

[fol. 101] Mr. Bullard: Yes, sir.

The Court: Do any of the rest of you want to ask him any questions? All right, sir, thank you, Mr. Bullard.

Mrs. Bush.

(Albert Fenner Bullard, Juror No. 12, left the Court's Chambers.)

(Hattie M. Bush, Juror No. 13, entered the Court's Chambers.)

The Court: Morning, Mrs. Bush, sit down. What we are inquiring about is a couple of newspaper articles that appeared in the newspaper, one last night in the Post and one this morning in the News about this case. Did you read either one of these articles?

Mrs. Bush: No, I don't recall seeing either of them. I glanced over the paper in the jury room but I concentrated on the Archina case.

The Court: You didn't see either one of them?

Mrs. Bush: No, sir.

The Court: Has anyone talked to you about either one of the items?

Mrs. Bush: No.

The Court: No one has mentioned it to you?

Mrs. Bush: No, sir.

The Court: No one said there was a piece in the——

Mrs. Bush: They have been chatting in the room where the jurors are now since they have been called in here but except for that, I haven't talked to anyone.

The Court: No one has told you what the article said or anything of that sort?

[fol. 102] Mrs. Bush: No.

The Court: All right, I don't think there is any further questions. Thank you, Mrs. Bush. Mrs. Bottinelli.

(Hattie M. Bush, Juror No. 13, left the Court's Chambers.)

(Chelsea Mae Bottinelli, Juror No. 10, entered the Court's Chambers.)

The Court: Morning, Mrs. Bottinelli, sit down right there. What I am inquiring about, Mrs. Bottinelli, are a couple of newspaper articles about this case, one of them appeared in the Post last night and one of them in the News this morning. Did you read either one of these pieces?

Mrs. Bottinelli: Yes, I did, I read the one in the News.

The Court: The one in the News this morning?

Mrs. Bottinelli: Yes.

The Court: Did anything you read in that item prejudice you in any way against the defendant?

Mrs. Bottinelli: No, I would try to be as fair as I could.

The Court: Would what you read influence you in any way in reaching a verdict on the case?

Mrs. Bottinelli: No.

The Court: You could lay that out of your mind entirely and decide the case on the evidence you hear from the witness stand?

Mrs. Bottinelli: The evidence I've got to understand is whether he sold the medicine, so that would have nothing to do from this.

[fol. 103] The Court: You would decide that from the evidence in the courtroom?

Mrs. Bottinelli: Yes, and not the rest.

The Court: You wouldn't have in mind this article you read in the newspaper whether he is guilty or innocent, is that right?

Mrs. Bottinelli: That's right.

The Court: Do any of you want to ask any further questions? All right, Mr. Francis.

Mr. Francis: I realize you want to be as fair as possible and certainly we would not have this jury if we didn't think every member was fair. Do you feel in your heart and without restraint that if you were in the defendant's position, that is to say, sitting where Mr. Marshall is sitting, and your own mind is as it is now as a result of having read the paper, that you could still feel that you could absolutely, impartially listen to the case and bring in a verdict?

Mrs. Botinelli: (sic) Yes, I think I could.

Mr. Francis: Fine, thank you very much.

The Court: Thank you very much. Mrs. Humphris.

(Chelsea Mae Bottinelli, Juror No. 10, left the Court's Chambers.)

(Pauline D. Humphris, Juror No. 34, entered the Court's Chambers.)

The Court: Good morning, Mrs. Humphris. What we are inquiring about in here this morning are a couple of articles that appeared in the Denver newspaper, one was in the Post last night and one was in the News this morning about this case. Did you read either one of them or both of them?

Mrs. Humphris: I didn't read it but I knew it was in the Post last night because my husband called my attention to it.

[fol. 104] The Court: Did he read it to you?

Mrs. Humphris: No.

The Court: Did you read it yourself?

Mrs. Humphris: No.

The Court: Was there any discussion about what the article said?

Mrs. Humphris: No, sir.

The Court: Then you have at this time no information about what is in the article?

Mrs. Humphris: No, I don't.

The Court: From what I gather there is nothing in the episode that your husband happened to mention that would in any way be a matter for you to consider in this case at all?

Mrs. Humphris: No, he just mentioned, "Was that the case you're on?" I said, "I guess it is," I didn't even pay that much attention to it.

The Court: Did anything happen in connection with this article that would raise any prejudice in your mind against the defendant?

Mrs. Humphris: No, sir.

The Court: Do you wish to ask any questions? Thank you, Mrs. Humphris.

(Pauline D. Humphris, Juror No. 34, left the Court's Chambers.)

(Lucille B. Downer, Juror No. 22, entered the Court's Chambers.)

The Court: Morning, Mrs. Downer. What we are inquiring about has to do with two items that appeared in [fol. 105] the Denver papers, one in the Post last night and the other in the News this morning about this case. Did you happen to read these items?

Mrs. Downer: I read the one this morning.

The Court: In the News?

Mrs. Downer: Yes.

The Court: Was there anything in that article that would prejudice you against the defendant?

Mrs. Downer: No.

The Court: If we go ahead and try the case and it does reach a point of determination by you, was there anything in the article that would influence you at all in the consideration of the case?

Mrs. Downer: No.

The Court: You feel that you could go ahead at the trial and arrive at your verdict from the evidence you hear in

the courtroom and not give any consideration at all to what you read in these newspapers?

Mrs. Downer: That is right.

The Court: There is nothing you read in the newspaper that would influence you in the consideration of the evidence in the case?

Mrs. Downer: No.

The Court: Do you wish to ask any questions?

Mr. Francis: I know you want to be absolutely fair in this case and it is for that reason that we are inquiring this morning. If your feelings would in any way be in- [fol. 106] fluenced, however slight, by what you read or what you have read and if your feeling would in any way be influenced against the defendant, we would appreciate knowing it.

Mrs. Downer: No, I don't feel that it would make any difference at all, that is what I said.

Mr. Francis: Yes, Ma'am, I know that, but do you feel if you were in Mr. Marshall's chair that the article as read by the jury would still not be unfair to Mr. Marshall?

Mrs. Downer: What do you mean?

Mr. Francis: Well, do you think in your own mind that having read what you did read that you can look at the case fairly?

Mrs. Downer: Well, I feel thatwe (sic) are supposed to just accept what we hear from the witness stand, not anything that is in the paper. There is a lot of things I read in the paper I don't believe.

Mr. Francis: Yes, Ma'am.

The Court: Any further questions?

That is all, thank you, Mrs. Downer.

(Lucille B. Downer, Juror No. 22, left the Court's Chambers.)

[fol. 107]

EXHIBITS MARKED IN CHAMBERS

Newspaper articles filed September 26, 1957.

Rocky Mountain News, September 26, 1957

Jury Selected to Try Man on Drug Charge

A Jury of seven women and five men was selected in U.S. District Court Wednesday to try Howard R. Marshall, 47, former Oklahoma City resident, on charges of dispensing habit-forming drugs without a prescription.

Marshall is on trial before U.S. Dist. Judge Lee Knous on three specific counts of dispensing or selling the drugs to a federal Food and Drug Administration inspector April 23 and May 1, last year.

The inspector, Robert Keating, told the jury of obtaining "some yellow tablets" on April 23. He said he later obtained more tablets and "some capsules" in May. The inspector said he paid $15 on the last purchase.

Don Taylor, FDA chief chemist here, testified that chemical examination showed the "yellow tablets" had as an active ingredient, destro-amphetamine (sic) sulphate, a form of stimulant.

Marshall has a record of two previous felony convictions.

In 1953, while serving a forgery sentence in the State Penitentiary at McAlister, Okla., Marshall testified before a state legislative committee studying new drug laws for Oklahoma.

At that time, he told the committee that although he had only a high school education, he practiced medicine with a $25 diploma he received through the mails. He told in detail of the ease in which he wrote and passed prescriptions for dangerous drugs.

[fol. 108]

Denver Post, September 25, 1957

Trial Opens on Sale of Restricted Drugs

A 47-year-old Tulsa, Okla., man went on trial in Federal District Court here Wednesday on charges of selling re-

stricted drugs on a route between his home town and Denver.

The defendant was Howard R. (Tobey) Marshall, once identified before a committee of the Oklahoma Legislature as a man who acted as a physician and prescribed restricted drugs for Hank Williams before the country singer's death in December, 1953.

A jury was first selected here last Thursday but a mistrial was declared when one of the jurors recalled he had gone to school with a witness in the case.

Marshall was arrested with his wife, Edith Every Marshall, 56, in June, 1956. She was convicted on the drug charges in Federal District Court here in November and was sentenced to 60 days in jail.

Records show that Marshall once served a term in the Oklahoma penitentiary for forgery. There is no evidence he is a doctor, court attaches said.

Filed, United States Court of Appeals, Tenth Circuit, January 21, 1958. Robert B. Cartwright, Clerk.

CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 112] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Tenth Circuit.

Record entry: Cause argued

First Day, May Term, Monday, May 12th, 1958.

Before Honorable Alfred P. Murrah, Honorable John C. Pickett, and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard, George J. Francis, Esquire, appearing for appellant, Arthur A. Dickerman, Esquire, appearing for appellee.

Thereupon argument was commenced by counsel and continued to the hour of adjournment.

[fol. 113]

IN UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

ARGUMENT AND SUBMISSION—May 13, 1958

This cause came on further to be heard, George J. Francis, Esquire, appearing for appellant, Arthur E. Dickerman, Esquire, appearing for appellee.

On motion of appellant, it was ordered that appellant may file a supplemental list of authorities in this cause within five days from this day.

Thereupon argument by counsel was concluded and the cause was submitted to the court.

[fol. 114]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Title omitted]

OPINION—July 22, 1958

George J. Francis for Appellant.

Arthur A. Dickerman (Donald E. Kelley, United States Attorney for the District of Colorado, Robert S. Wham and James C. Perrill, Assistant United States Attorneys for the District of Colorado, and Leonard D. Hardy, Attorney U. S. Department of Health, Education and Welfare, were with him on the brief) for Appellee.

Before Murrah, Pickett and Lewis, Circuit Judges.

Lewis, Circuit Judge.

[fol. 114a] Appellant was convicted on two counts of an information charging violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. 301 et seq. The principal issues before us spring from appellant's contentions that

as a matter of law the defense of entrapment was established and that he was prejudiced beyond recall by newspaper accounts published during the course of his trial. Other errors assigned question the jurisdiction of the court and the sufficiency of the evidence to support the verdicts.

The alleged entrapment centers around the activities of Robert E. Keating, an inspector for the United States Food and Drug Administration and an uncontroverted witness for the prosecution. Keating first met appellant in Denver, Colorado on April 18, 1956. The introduction of the two men was made at appellant's apartment by mutual friends, was purely social in form and did not disclose Keating's official employment. The conversation at this initial meeting was casual and general. On April 23 Keating returned to appellant's apartment and again visited with appellant and his wife. After some further social talk, Keating stated that he was driving to Dallas, Texas, that evening and requested from appellant some stay-awake pills to help him in the traveling. Appellant replied that Keating should obtain and take some No-Doz[1] tablets and drink coffee. [fol. 115] Keating replied that he had tried No-Doz and coffee without obtaining the desired effect and wanted something different. Appellant repeated his recommendation and the conversation was then diverted into other subjects. After Keating left the apartment he was hailed by appellant and handed a package containing five tablets and two capsules. Appellant stated that the tablets were to be used if Keating became sleepy while driving and that the capsules should be taken if he was nervous after arriving in Dallas. Chemical analysis of the tablets established them to be dextro-amphetamine sulfate, a drug within the meaning of 21 U.S.C.A. 353 (b) (1)B[2] and with-

[1] No-Doz is a patented product sold freely over-the-counter.

[2] 21 U.S.C.A. 353 (b) (1). "A drug intended for use by man which—

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(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug . . .

(C) . . . shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug. . . . The

in the prohibition of unlicensed dispensing under 21 U.S. C.A. 331 (k).[3]

[fol. 116] On May 1, Keating again called on appellant, stating that he had "gotten along very well" on the Dallas trip and would like a hundred or so of each of the drugs for a trip to be made to Los Angeles upon the following day. Appellant replied that he would have to go to the drugstore, refused Keating's suggestion that they go together, and told Keating to return later. This he did and was handed two vials containing 50 tablets and 24 capsules later analyzed as the prohibited drug. Keating paid appellant $15 upon this occasion.

It is undisputed that all of Keating's representations relative to his identity, occupation, trips and use of drugs were entirely false and that upon each occasion the atmosphere of social friendship was created by conversation unrelated to the subject of stay-awake tablets.

The defendant offered no evidence. The issue of entrapment was submitted to the jury upon instructions not here questioned and the defense was rejected by conviction. Appellant urges that the court should have ruled as a matter of law that entrapment was established.

The fountainhead rule and philosophy of entrapment was set out in Sorrells v. United States, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413, and very recently debated in Sherman v. United States, 356 U.S. 369, and Masciale v. United States, 356 U.S. 386, both decided May 19, 1958. In *Sherman,* the court in reviewing the undisputed testimony of a government witness unanimously concluded that the trial court was required under the circumstances there-

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act of dispensing a drug contrary to the provisions of this paragraph shall be deemed an act which results in the drug being misbranded while held for sale."

[3] 21 U.S.C.A. 331. "The following acts and the causing thereof are hereby prohibited:

* * * * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

[fol. 117] in to direct a verdict effectuating the defense of entrapment as a matter of law. The order of reversal set aside a verdict of a jury which had considered and rejected entrapment as a defense submitted to its consideration under instruction of the court. Since the instant case, as *Sherman,* involves only consideration of the undisputed testimony of a government witness with no issue of credibility involved we conclude that submission of the issue of entrapment to the jury was improper. However, such submission could not prejudice appellant, in fact could but give him an unwarranted advantage, unless a directed verdict was required as a matter of law. A comparison of the activities of Keating with those of the informer in *Sherman,* where entrapment was established as a matter of law, and with those of the government agent in *Masciale,* where the court held entrapment not so established, shows the latter case to be persuasive.

In *Sherman,* the government informer met the defendand (sic) at a doctor's office where both were apparently being treated for narcotics addition. They discussed over a period of time their difficulties in overcoming their habits and finally the informer confessed that he was unable to do so, begging the defendant to help him find a source of supply. Only after a number of repetitions of the request did the defendant finally procure the drug for his acquaintance. The result of this conduct was that the defendant himself [fol. 118] returned to the use of narcotics. Emphasis is placed upon the fact that the government played upon the known weaknesses of the defendant and that the crime resulted from the "creative activity" of the law enforcement officials. See 287 U.S. at 441, 451.

In *Masciale,* the defendant was introduced to a government agent by an informer who did not reveal the agent's capacity with the government. The agent solicited the defendant for an introduction to a supplier of heroin. The court noted that the factual situation was such as to allow an inference that the defendant needed no persuasion to commit the crime.

Although in our case the activities of Keating consisted of artifice and deceit to lay a trap for defendant we believe the activities of the government to be well within allowable limits. The law will protect the innocent from being led

to crime through the activities of law enforcement officers, Sherman v. United States, supra, but it will not protect the guilty from the consequences of subjectively mistaking apparent for actual opportunity to safely commit crime. Sorrells v. United States, supra; Archambault v. United States (10 Cir.) 224 F. 2d 925.

During the course of the trial two articles of a reckless nature were published in local newspapers covering matters far removed in time and place from a factual report [fol. 119] of the trial occurrences. Six of the jurors read one of the articles and two of the six had read both. The trial court separately interviewed, in the presence and with the assistance of counsel, each of the jurors and thereafter denied a motion for mistrial. Each of the jurors indicated the articles would in no way influence his verdict.[1]

[1] Typical of the responses received by the court is that of the juror Bottinelli:

"The Court: Morning, Mrs. Bottinelli, sit down right there. What I am inquiring about, Mrs. Bottinelli, are a couple of newspaper articles about this case, one of them appeared in the Post last night and one of them in the News this morning. Did you read either one of these pieces?

Mrs. Bottinelli: Yes, I did. I read the one in the News.

The Court: The one in the News this morning?

Mrs. Bottinelli: Yes.

The Court: Did anything you read in that item prejudice you in any way against the defendant?

Mrs. Bottinelli: No, I would try to be as fair as I could.

The Court: Would what you read influence you in any way in reaching a verdict on the case?

Mrs. Bottinelli: No.

The Court: You could lay that out of your mind entirely and decide the case on the evidence you hear from the witness stand?

Mrs. Bottinelli: The evidence I've got to understand is whether he sold the needles, so that would have nothing to do from this.

The Court: You would decide that from the evidence in the courtroom?

Mrs. Bottinelli: Yes, and not the rest.

The Court: You wouldn't have in mind this article you read in the newspaper whether he is guilty or innocent, is that right?

Mrs. Bottinelli: That's right.

The Court: Do any of you want to ask any further questions? All right, Mr. Evans.

Mr. Evans: I'm sure you want to be as fair as possible and certainly we would not have this jury if we didn't think every

fol. 120] It is conceded that a motion for a mistrial is addressed to the sound discretion of the trial judge, and whether it should be granted depends upon all of the circumstances in the case, United States v. Carruthers (7 Cir.) 152 F. 2d 512; Marson v. United States (6 Cir.) 203 F. 2d 904; Webb v. United States (10 Cir.) 191 F. 2d 512. The mere appearance of articles concerning the trial cannot compel a new trial, for the defense may at times be aided rather than hindered or the report may only convey to jurors that which they had heard the previous day in court or amount to fair comment thereon. Miller v. Commonwealth of Kentucky (6 Cir.) 40 F. 2d 820; Klose v. United States (8 Cir.) 49 F. 2d 177; United States v. Pisano (7 Cir.) 193 F. 2d 355. A cautionary instruction against prejudice or consideration of evidence beyond that presented in the courtroom has been held in such instances to be sufficient safeguard for defendant's rights.

It is true that in certain instances the probable influence of newspaper publicity is so obvious that instructions by the court cannot be held to have preserved inviolate defendant's rights to a fair trial before an unbiased jury. See concurring opinion of Justices Jackson and Frankfurter, Shepherd v. Florida, 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740; Griffin v. United States (3 Cir.) 295 F. 437. But the difficulties of ever obtaining a jury completely un-
fol. 121] knowing and hence presumably unprejudiced in this day of wide coverage and circulation of newspapers presents a very real problem in the administration of justice. For this reason, some courts have been lead (sic) to holding that to secure a reversal on this ground the defendant must demonstrate that the failure to declare a mistrial under such circumstances was prejudicial to him.

[illegible] was fair. Do you feel in your heart and without restraint that if you were in the defendant's position, that is to say, sitting at the table with Mr. Marshall as your own mind as it is now as a result of having read the paper, that you could still feel that you could absolutely impartially listen to the case and bring in a [illegible]

Mrs. Bottorff: Yes, I think I could.

Mr. Fortenberry: Fine, thank you very much.

The Court: Thank you very much.

Gicinto v. United States (8 Cir.) 212 F. 2d 8, cert. den. 348 U.S. 884; United States v. Carruthers, supra.

Had the instant trial been to the court alone it would be unquestioned that the court would be capable of and would divorce the extraneous matters from his mind and be perfectly free to continue with the trial. The care with which the trial court explored the knowledge and feeling of the individual jurors indicated to him that each juror was similarly qualified to proceed without prejudice. We cannot say the trial court abused its discretion in accepting as true the solemn statements of the individual jurors that no improper influence would carry over into their deliberations. See United States v. Postma (2 Cir.) 242 F. 2d 488. Strengthening our view that the trial court did not err in denying a mistrial is the completed record of the trial for, as stated in Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination [fol. 122] of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. . . . Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment." 328 U.S. at 762.

Here no affirmative defense was offered, neither the appellant nor a witness for him testified in his behalf; he was content to rely upon the hope of a failure of proof by the prosecution. The evidence was uncontroverted that he committed the crime and his contention that he was entitled to go to the jury on evidence of entrapment appearing in government testimony was, as we have held, without merit. Under all of the circumstances of the case, therefore, a jury properly instructed and acting in accordance with its duty could but return a verdict of guilty. We find no area for prejudice to occupy, even if it existed.

Appellant's other contentions require little discussion.

Asserting in the alternative that the federal court had no jurisdiction to try this offense because the drug, although shown to have traveled in interstate commerce, was no longer within federally protected traffic or that Congress constitutionally lacked the power to grant such jurisdiction, appellant cites the controlling case of United States v. Sullivan, 332 U.S. 689, 68 S. Ct. 331, 92 L. Ed. 297. Both propositions were settled in that case contrary to appellant's position on facts sufficiently similar to preclude argument.

[fol. 123] 21 U.S.C. 331(k) makes it an offense to do any act with respect to a drug which results in its being misbranded while the article is held for sale *after shipment in interstate commerce*. The Supreme Court in the *Sullivan* case refused to give a restrictive interpretation to the statute because Congress intended to give protection to the ultimate consumer from the moment of the introduction of a drug into interstate commerce to the time of final delivery, regardless of intermediate intrastate transactions. It was there held that the Act as thus construed does not exceed the constitutional power of Congress under the Commerce Clause or invade the powers reserved to the states.

The prosecution's case showed that the dextro-amphetamine sulfate tablets were manufactured in New York and that they were ultimately dispensed by appellant in Colorado. Apparently in this, as in most cases, it was impossible to trace the route taken in interstate commerce or to show that appellant received them from an interstate sale, but under the language of the statute and the interpretation of the Supreme Court, intervening sales are immaterial. Archambault v. United States, supra.

Appellant finally argues that the proof that the drugs were manufactured in New York was incomplete, basing his argument on the fact that the tablets were compared for identification purposes with similar tablets previously [fol. 124] collected from various manufacturers by the laboratory of the Food and Drug Administration. However, this comparison with the "reference collection" was only preliminary and the investigation was concluded at the plant of the New York pharmacal company where

identification both chemical and physical was made by the testifying witness. There is no merit in appellant's contention that the fact of interstate shipment was not adequately proved.

Affirmed.

Murrah, dissenting.

We all appreciate the necessity for maintaining the inviolability of jury trials and our inescapable duty to vouchsafe them in the administration of justice. And, we know that we can do so only by wholly disinterested jurors whose judgments are based only upon a consideration of competent proof produced in open court. See Southern Pacific Co. v. Klinge, 65 F.2d 85; Little v. United States, 73 F.2d 861; Stone v. United States, 113 F.2d 70; Briggs v. United States, 221 F.2d 636. We recently had occasion to reemphasize our solicitude in this regard. Consolidated Gas & Equipment Co. v. Clarence E. Carver et al (10 CA) — F.2d —. And see also Rubenstein v. United States, 227 F.2d 638, cert. den. 350 U.S. 926. Our problem is to achieve this ideal in an environment where crime and violence are [fol. 125] exploited by news media and jurors are likely to be exposed, and consciously or unconsciously influenced by the emotional impact of the exploitation. In earlier times juries were completely insulated from all outside contacts. In modern times, the rules have been relaxed to allow jurors to separate under appropriate admonition not to read news accounts of the case on trial or to discuss the case with anyone, or to allow anyone to discuss it with them. Jurors have been trusted to observe these admonitions, and our faith has, in the main, been vindicated. We have indulged in the assumption that mere opportunity for prejudice or even corruption is no proof of it. See Holt v. United States, 218 U.S. 245.

The necessity for conducting trials in an environment where separated jurors are almost unavoidably exposed to news comment, has led some courts to accept the "standard judicial hypothesis that cautioning instructions are effective" to eradicate the contaminating effect of inflammatory exposures, unless there is a "clear and present danger" of the deprivation of a constitutionally protected fair trial

See Chief Judge Clark in United States v. Leviton, 193 F.2d 848. See also Reining v. United States, 167 F.2d 362; United States v. Allied Stevedoring Corp., 241 F.2d 925; United States v. Postma, 242 F.2d 488; Hensloe v. United States, 246 F.2d 190. Many cases on the subject are collected in an Annot. 31 A.L.R. 2d 417.

[fol. 126] I agree with Judge Frank (dissenting in the Leviton case, p. 865) that "trial by newspaper," even in the very midst of irresponsible news comment, is neither inevitable nor tolerable. Without assaying to curb extraneous comment on trials, it is my belief that jurors, while engaged in the trial of a case, can be appropriately and conveniently insulated from exposure to public emotionalism, which often attends criminal cases. Emphatic admonitions by the trial court at the very outset of the trial against the reading of newspapers or listening to news media, would go a long way toward safeguarding the trial against insiduous (sic) and inflammatory matters. The trial court is, to be sure, the first and best judge of what is calculated to contaminate the jury or may have the ineradicable effect of doing so. Appellate courts should interfere only when matters of judicial policy are involved. In my opinion, matters of policy affecting the administration of criminal justice is involved here and it is my duty to speak.

Of course intrusions may be only trivial or innocuous and certainly curable by appropriate admonitions. It is important that mistrials or new trials not be granted for "trifling reasons." See Southern Pacific Co. v. Klinge, supra. They may not be calculated to or have the effect of unduly influencing a juror, either consciously or unconsciously. But the newspaper article to which some of [fol. 127] the jurors in this case were exposed stated not only the developments in the courtroom, it went on to state categorically that the accused had a "record of two previous felony convictions"; that while serving a forgery sentence in a state penitentiary he had testified before a state legislative committee then studying new state drug laws; that he had told the committee of having practiced medicine with a twenty five-dollar diploma received through the mails; and had written and passed prescriptions for

dangerous drugs. The other newspaper article to which some of the jurors were exposed related that the accused had been arrested with his wife; that she had been convicted on drug charges in the same court and sentenced to jail.

Since the accused elected to stand mute and did not offer his character as a defense, these statements were inadmissible and manifestly prejudicial. See Michelson v. United States, 335 U.S. 469. Indeed, no attempt was made to inject these matters in the trial of the case, and the court would have doubtless dealt firmly with any attempt to do so. Recognizing the gravity of the matter, the court conducted a searching inquiry concerning the jurors' exposure to the newspaper articles and illicited (sic) from each of the jurors who had read them a vow that he or she was uninfluenced thereby, and would try the case as if they had not read them. The inquiry was as careful and the responses as positive as one could expect, and if we are to [fol. 128] take the jurors' conscientious word for their state of mind, we must assume that all extraneous knowledge of the accused's prior and damaging record was completely banished from the jurors' minds and did not influence their consideration of his only defense of entrapment. But, the "naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." See Jackson concurring in Krulewitch v. United States, 336 U.S. 440, 453.

Without questioning the thoroughness of the judicial inquiry, or impuning (sic) the conscientiousness of the jurors' avowals, it is my firm conviction that no juror could try this accused on the issue of whether he was in fact induced by the government to commit the act for which he was on trial as if they did not know that his past record and moral traits inclined him toward it. I cannot believe that the untrained human mind is capable of any such nice discriminations. It is too much to expect a juror, sensing the impropriety of having read an extraneous and prejudicial account of a case he is then trying, to admit any prejudicial effect.

If the jury is yet to be the factual judge of the defense of entrapment and the predisposition of the accused rather

than the conduct of the government is to be the legal test, i.e. see Sherman v. United States, 356 U.S. 369; and Masciale v. United States, 356 U.S. 386, prior record and [fol. 129] moral traits become of primary importance in the determination of that vital issue. For in cases like this where entrapment is the only defense, prior convictions of the same offense are to be sure the best evidence to show essential predisposition. This brings us face to face with Mr. Justice Frankfurter's warning of the "Danger of prejudice in such a situation." For, said he, "The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged." Concurring, Sherman v. United States, supra, p. 382. The only escape from the dilemma is to commit the issue of entrapment to the court. But, so long as it remains a jury question, record and reputation to prove predisposition or lack of it must be relevant, competent and admissible. Harbold v. United States (10 CA) decided April 24, 1958, —— F.2d ——. If so, such evidence ought certainly to be produced in open court with the traditional right of confrontation and cross examination. If they are to be excluded, as in this case, they ought not be permitted to seep into the jury room to poison the minds of the jurors on the vital issue which divides guilt and innocence. In sum, it is my view that if the extraneous matter disclosed in the newspaper articles is forbidden, it is ineradicably prejudicial. It it is competent and ad- [fol. 130] missible, it ought to be imparted to the jury in open court. In any event, I would reverse for a new trial.

[fol. 131]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUDGMENT—July 22, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Howard R. Marshall, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

[fol. 132]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed August 1, 1958

To the United States Court of Appeals, Tenth Circuit, and the Judges Thereof:

Comes now the appellant and respectfully presents his petition for rehearing of the above-entitled appeal, and in support thereof respectfully shows:

1. The Court in holding that a defendant in cases involving publications of the type involved in the instant case must show prejudice to himself has misconstrued the law and overlooks the fact that the *Gicinto* and *Carruthers* cases are distinguishable and are not authority to support the holding in the instant case.

2. The Court in holding that the jury herein "could but return a verdict of guilty" disregards the rule that the role of the Appellate Court in cases of this sort is not to determine guilt or innocence of the appellant.

3. The Court disregards the fundamental rule of law that prior convictions when excludable are excluded from evidence by reason of fixed policy without inquiry into the probable effect such convictions might have on the minds of the jurors.

4. The Court's decision that the appellant was not entrapped as a matter of law is in conflict with the *Sherman* case.

[fol. 133] Wherefore, upon the grounds above set forth, it is respectfully prayed that the petition for rehearing be granted, that the opinion of this Court on appeal be withdrawn, and that an opinion be entered remanding the case for new trial or dismissing it.

Respectfully submitted,

George J. Francis, 817 Farmers Union Building, Denver, Colorado, AMherst 6-0621, Attorney for Appellant.

Certificate of Counsel

I, George J. Francis, counsel for appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

/s/ George J. Francis

[fol. 134]

Brief in Support of Petition for Rehearing

I. The Court's Ruling That Prejudice Must Be Shown in Cases of This Sort Is Not Supported by Authority.

The Court herein held fundamentally that considering the publication read by the jurors in the jury room during the course of trial to the effect that appellant had a "record of two previous felony convictions," and that appellant's wife had been convicted and sentenced to jail as a result of the same matters involved herein, the appellant's burden was to show prejudice. This fundamental rule of law enunciated by this Court is based upon two cases, *Gicinto* vs. *United States*, 212 F.2d 8 (8 Cir.), and *United States* vs. *Carruthers*, 152 F.2d 512 (7 Cir.).

Considering that this Circuit is now taking a position for the first time on the point involved, i.e., the jurors' reading of newspapers regarding a defendant's past convictions, it should keep in mind that neither of the above cases support the position now taken in the instant opinion.

In the *Cicinto* case the newspaper article in question stated that the defendant therein had been found not guilty of another crime. And it was further determined in that case that there was no evidence that the article had been read. Similarly, in the *Carruthers* case, the article in question, one far less inflammatory than the article involved herein, was read by only one of the jurors. The evidence in the *Carruthers* case was that one juror could not remember the contents of the article.

Therefore, neither case relied upon by this Honorable Court supports the fundamental proposition it now sets forth for the first time in this circuit or as far as appellant can determine, in any federal circuit.

[fol. 135] II. The Question Involved Is One of Fundamental Policy in Criminal Law and Not a Question of Showing Prejudice.

The Court in its majority opinion sets forth that the appellant must show prejudice. This position overlooks the long-established rule of law that prior convictions when excludable, as herein, cannot be brought to the jury's attention. The Honorable Judge Murrah in his dissenting opinion cites *Michelson* vs. *United States* to the effect that such matters are inadmissible and manifestly prejudicial. This position is in accord with prevailing authority. In the early case of *Greer* vs. *United States*, 245 U.S. 559, Justice Holmes indicated that character evidence relating to a party was inadmissible unless a party first put such matter in issue. Justice Holmes went on to state that the choice of raising such issue rested with the defendant alone:

> "As the Government cannot put in evidence except to answer evidence introduced by the defense the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him" (p. 560).

That it is a matter of longstanding policy to exclude evidence of the type involved is something all courts

accept. The Second Circuit sets forth that doctrine in *United States* vs. *Rattan Co.*, 159 F.2d 656 at page 658:

> "The general rule applicable . . . is that evidence of the commission of a wholly separate and independent crime even of the same nature is not admissible.
>
> "Sound policy in the administration of the criminal law underlies this well established principle . . ."

The Fifth Circuit in *Mackreth* vs. *United States*, 103 F.2d 495, clearly states that the admission of evidence of prior conviction will result in granting of a new trial:

> "Its admission was highly prejudicial and seriously affected the substantial rights of the defendants. The errors committed in admitting it can not be considered harmless under the provisions of Section 269 . . . 28 U.S.C.A. §391."

[fol. 136] Admittedly the problem involved is a difficult one and many matters come to a jury's attention which are improper in varying degrees but not so prejudicial as to result in new trial. Some leeway must be left to newspapers. Similarly, the trial court should have broad discretion in passing upon matters brought before juries by newspapers and other media of communication.

But the line must be drawn beyond which it is not a question of prejudice being shown. When newspapers print matters which result in defendants being deprived of certain well-recognized and well-established rights, then as a matter of sound judicial policy a new trial must be granted.

It is for that reason that appellant respectfully questions the majority opinion of the Court saying that the jury "could but return a verdict of guilty" from the evidence before it. In *Kotteakos* vs. *United States*, 328 U.S. 750, at page 763, the Supreme Court sets forth:

> "Thus, it is not the appellate Court's function to determine guilt or innocence."

The question in the instant case is one of fundamental rights and fair trial.

III. The Ruling in the *Sherman* Case Is in Favor of Appellant.

In the recent case of *Sherman* vs. *United States*, 356 U.S. 369, there were facts quite on a parallel with the instant case. There as here the defendant did not take the stand. Entrapment, therefore, may become an issue without defendant taking the stand. In the *Sherman* case the Court noted the fact that the defendant was not engaged in the narcotic trade and here the trial court ruled out rebuttal on the grounds no similar activity was being offered as rebuttal evidence. In the *Sherman* case the Supreme Court noted the fact, as here, that there was no significant evidence of a profit being made. Also, in both cases matters arose as to past convictions. These comparable matters are commented on by the Supreme Court at page 375. Here, as in the *Sherman* case, we have the "creative activity" of the Government.

A final comparison is the fact that Keating asked for the "stay awake pills" to enable him to make a long drive the [fol. 137] evenings in question and certainly such a request would in many cases be met sympathetically. All in all, a defense of entrapment was well-established and as a matter of law appellant was entitled to a directed verdict.

Respectfully submitted,

George J. Francis, 817 Farmers Union Building, Denver, Colorado, AMherst 6-0621, Attorney for Appellant.

Filed August 1, 1958.

[fol. 138]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—August 21, 1958

Before Honorable Alfred P. Murrah, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[fol. 139] CLERK'S CERTIFICATE (omitted in printing).

[fol. 141]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 17, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted limited to the first question presented by the petition for the writ which reads as follows:

"Whether a defendant in a criminal trial to a jury is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.